

previously extended, New York would not have learned of the planned blasting before reaching its decision. While not determinative, blasting information was important to the State's decision and an appropriate issue for consideration, to the extent feasible under the extension agreement. As issued, New York's objection to Millennium's project indicated that "[b]lasting, with the mitigation measures proposed by Millennium, would have adverse affects on the Significant Coastal Fish and Wildlife Habitat of Haverstraw Bay [and] [f]or this reason, . . . would not be consistent with Policy 7 of the [State Coastal Management Program]"⁶⁰

D - Conclusion

For the reasons discussed *supra*, New York's request for information about blasting and its subsequent objection to the consistency certification for Millennium's project occurred within the time frame provided by the parties' mutual agreement entered into pursuant to 15 C.F.R. §930.60(a)(3). Consequently, New York's objection to the proposed pipeline, as issued on May 9, 2002, was timely.

III - STATUTORY GROUNDS FOR OVERRIDE

A - Statutory and Regulatory Framework

The CZMA provides states with federally approved coastal management programs the opportunity to review proposed projects requiring federal licenses or permits if the project will affect any land or water use or natural resource of the state's coastal zone. 16 U.S.C. § 1456(c)(3)(A). A timely objection raised by a state to the project precludes federal agencies from granting licenses or permits required for the project, unless the Secretary of Commerce finds that the activity is:

“consistent with the objectives of [the CZMA]” (Ground I); *or*

- “necessary in the interest of national security” (Ground II).
- 16 U.S.C. § 1456(c)(3)(A); *see also* 15 C.F.R. §§ 930.121, 122, 130(d).

In its Notice of Appeal, Millennium asserts its proposed pipeline project satisfies both Ground I and Ground II. A finding that either ground is satisfied will result in an override of the State's objection.

B - Consistent with the Objectives of the CZMA (Ground I)

A project is consistent with the objectives of the CZMA if it satisfies *each* of the following three

⁶⁰ Letter from George R. Stafford to Thomas S. West, May 9, 2002, at 12.

requirements contained in NOAA's CZMA regulations:⁶¹

- (1) The activity furthers the national interest as articulated in § 302 (Congressional Findings) or § 303 (Congressional Declaration of Policy) of the CZMA, in a significant or substantial manner;
- (2) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively; and
- (3) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the state coastal management program. (When determining whether a reasonable alternative is available, the Secretary may consider, but is not limited to considering, previous appeal decisions, alternatives described in objection letters and alternatives and other new information described during the appeal.)

A negative finding for *any* of the three elements will preclude Millennium's project from being consistent with the objectives of the CZMA. For this appeal, the third element is dispositive, and therefore is the focus of the discussion concerning Ground I.

1. The Existence of a Reasonable, Available Alternative (Element 3)

Background

– Alternatives

In considering the question of whether an alternative would allow Millennium's project to proceed in a manner consistent with the New York Coastal Management Program, it is necessary to determine what constitutes an alternative. As contemplated by NOAA's regulations, an alternative consists of one or more changes to the project that would allow the project, albeit in a somewhat different form, to achieve its primary purpose in a manner consistent with the state's coastal management program.

As a state is responsible, pursuant to the CZMA, for determining the consistency of a proposed project, the state is also responsible for determining the degree to which an objectionable project must change in order to be considered "consistent" with the state coastal management program.⁶²

⁶¹ 15 C.F.R. §930.121.

⁶² Under the Coastal Zone Management Act, the state is charged with interpreting its coastal management program and applying it to a proposed activity to determine consistency. It would be incongruous with this structure for the Secretary to determine the consistency of an alternative to the proposed activity, simply because it was identified after the state had completed

Consequently, the Secretary looks to the state to describe alternatives that would allow the objectionable activity to be conducted in a manner consistent with the state's coastal management program.

In this appeal, more than 30 alterations to the project have been proposed for consideration by the Secretary. Suggested changes include those identified by the State, as well as *amici* (e.g., the Village of Croton-on-Hudson and the Town of Cortlandt) and other interested entities. However, only those changes that New York indicated are consistent with the State's Coastal Management Program can be found to satisfy Element 3. In this regard, New York states that the "... *alternatives it has identified* are ... consistent with New York's Coastal Management Program."⁶³ Consequently, for purposes of this decision, the modifications to the project that are consistent with New York's Coastal Management Program are those described in New York's objection letter of May 9, 2002, as well as its Initial and Reply Briefs and supporting materials.

In its letter objecting to the consistency certification for Millennium's project, New York identifies three separate approaches for modifying the pipeline route, any one of which "if adopted by the applicant, would permit the activity to be conducted in a manner consistent with the [New York Coastal Management Program]"⁶⁴ The State expressed no preference among the three approaches or alternatives, one of which would require Millennium to "route the Hudson River crossing of the pipeline north and outside of the designated Haverstraw Bay habitat, near or adjacent to the existing Algonquin pipeline crossing of the Hudson River and consider existing pipeline rights-of-way that avoid the New York City drinking water supply and

its review of the project. Decision and Findings in the Consistency Appeal of the Korea Drilling Co., at 22-23; *see also* Decision and Findings in the Consistency Appeal of the Va. Elec. and Power Co. (VEPCO), May 19, 1994, at 38.

A state may identify changes, if any, that would permit a proposed project to be consistent with its coastal management program at the time of its objection to the project or during an appeal. In lieu of identifying changes, the state may confirm that changes proposed by other entities would allow the project to be consistent with the state coastal management program. However, once the state has identified, in some manner, an alternative that, if adopted, would allow a proposed project to be consistent with the state coastal management program, it may not add additional requirements that would necessitate further changes to the project. To allow the state to act in this manner would be prejudicial to the interests of the project applicant. The state, however, may provide clarification or specify the details of a requirement in an alternative. Finally, the state may subsequently determine that changes to the project previously identified as necessary for consistency are no longer required.

⁶³ New York Reply Brief at 118 (emphasis added).

⁶⁴ Letter from George R. Stafford to Thomas S. West, May 9, 2002, at 15.

delivery system.”⁶⁵ Because the National Marine Fisheries Service (NMFS) and the Army Corps of Engineers, federal agencies with expertise in coastal and permitting issues raised by this appeal, provided comments supportive of a northern crossing, this alternative is considered first.⁶⁶

Criteria for Evaluating Alternatives

Prior consistency appeal decisions have defined four criteria to be used by the Secretary in determining whether an alternative fulfills the requirements of Element 3. In the event such an alternative is found to exist, the Secretary will not override a state’s objection on the basis of Ground I. For purposes of Element 3, an alternative is evaluated with regard to the following criteria: (1) consistency (with the state’s coastal management program); (2) specificity; (3) availability; and (4) reasonableness. The burden of proof for the first two criteria rests with the state. The burden then shifts to the appellant (Millennium) to demonstrate that an alternative is either unavailable or unreasonable.⁶⁷

As an initial matter, as noted *supra*, an alternative will satisfy Element 3 only if it allows the proposed activity to be conducted in a manner “consistent with the state’s coastal management program.”⁶⁸ The Secretary relies on the state to make this determination. “Sufficient specificity”

⁶⁵ *Id.* The other approaches described in New York’s objection letter are: (1) terminate the proposed pipeline in the vicinity of Bowline Point in Rockland County on the west side of the Hudson River; or (2) use excess capacity in the existing Algonquin pipeline. *Id.*

⁶⁶ See Letter from William T. Hogarth, NMFS, to Branden Blum, NOAA, Dec. 5, 2002, at 3 (a crossing north of Haverstraw Bay in the general vicinity of the existing Algonquin pipeline represents a significant reduction in impacts on aquatic resources and habitats, and is an ecologically preferred alternative); see also Letter from Patricia A. Kurkul, NMFS, to Richard R. Hoffman, FERC, Mar. 22, 2001; Letter from Patricia A. Kurkul, NMFS, to Lt. Colonel Mark D. Feierstein, District Engineer, ACOE, May 2, 2000; Letter from George Dunlop, Dept. of the Army, to Scott B. Gudes, NOAA, Nov. 21, 2002, enclosure at 2 (crossing the Hudson River north and outside of Haverstraw Bay is one alternative that would largely address concerns expressed by the Army Corps of Engineers).

⁶⁷ See Decision and Findings in the Consistency Appeal of the Va. Elec. and Power Co., May 19, 1994, at 39; see also Decision and Findings in the Consistency Appeal of the Korea Drilling Co., Jan. 19, 1989, at 23-24.

⁶⁸ An alternative satisfying Element 3 may be implemented by an appellant without need for further CZMA approval by the state, as the alternative has been determined to be consistent with the state coastal management program. However, such an alternative remains subject to all applicable permit and license requirements. Conditions or restrictions on the alternative that may be imposed by permitting and licensing authorities do not cause an alternative to become

is satisfied if an alternative is identified with enough details to permit a further evaluation of the alternative's reasonableness and availability.⁶⁹ "Availability" refers to the ability of the appellant to implement an alternative that achieves the primary or essential purpose of the project.⁷⁰ "Reasonableness" refers to the conclusion that an alternative's advantages to the resources and uses of the state's coastal zone exceed the alternative's increased costs, if any.⁷¹

Hudson River Crossings North of Haverstraw Bay

The alternative being considered would require the pipeline to cross the Hudson River north and outside of the designated Haverstraw Bay habitat near or adjacent to the existing Algonquin pipeline crossing.⁷² The three northern crossings of the Hudson River proposed by New York occur in the general vicinity of the existing Algonquin pipeline, and, from north to south, are:

the Algonquin Right-of-Way River Crossing⁷³ which would be located near the

"unavailable" unless the permit/license is denied or the conditions are sufficiently severe to make the alternative infeasible. *See Findings and Decision in the Matter of the Appeal by Exxon Co., U.S.A. (Santa Ynez Unit)*, Feb. 18, 1984, at 15-16.

Other alternatives in an appeal record *determined by the state to be consistent* may be implemented -- at the option of the appellant -- in lieu of an alternative found to be reasonable and available pursuant to Element 3, and without need for further CZMA approval by the state if the appellant's preferred alternative was proposed to avoid adverse effects to the same coastal resources or uses as the alternative for which it would substitute.

⁶⁹ *See Decision and Findings in the Consistency Appeal of the Va. Elec. and Power Co.*, May 19, 1994, at 40-42.

⁷⁰ *See Id.*, *Decision and Findings in the Consistency Appeal of the Va. Elec. and Power Co.*, May 19, 1994, at 38.

⁷¹ *See Id.*, at 38; *Decision and Findings in the Consistency Appeal of Yeamans Hall Club*, Aug. 1, 1992, at 6.

⁷² Letter from George R. Stafford to Thomas S. West, May 9, 2002, at 15.

⁷³ This route, referred to by the parties as "Route 10," comprises Segments M, N, and O on the USGS Topographic Map provided by Millennium at Exh. 78, Tab 11 (Map). *See Pipeline Route Review*, prepared by Baker Engineering NY, Inc. (Baker Engineering Report), Attachments 2 & 4. This modification intersects with Millennium's proposed route in the vicinity of South Mountain, then follows the Palisades Interstate Parkway north for approximately 4.2 miles. It would then follow an electric transmission right-of-way owned by Orange & Rockland and two parallel Algonquin pipelines until it reaches the Hudson River. The

Algonquin Natural Gas Pipeline;⁷⁴

the Electric Transmission Right-of-Way River Crossing⁷⁵ which would come ashore at the Consolidated Edison site on the eastern side of the Hudson River;⁷⁶ and

the Lovett Power Plant River Crossing⁷⁷ which would enter the Hudson River near the Lovett Power Station on the western shore, and cross to a quarry one-half mile south of the Consolidated Edison site on the eastern shore.⁷⁸

crossing would occur adjacent to Algonquin's right-of-way. On the eastern side of the Hudson, the pipeline would follow Con Ed's electric transmission lines near Buchanan, to rejoin the FERC certificated route in the Town of Cortlandt. *See* New York Reply Brief at 160; Baker Engineering Report at 16.

⁷⁴New York Reply Brief at 160. This appears to be the same crossing considered by FERC as part of its evaluation of "Hudson River North" Alternatives 1 and 2. *See* FEIS at 6-1 to 6-5.

⁷⁵ This route, referred to by the parties as "Route 9," comprises Map Segments M, P, and O. *See* Baker Engineering Report, Attachments 2 & 4. Similar to Route 10, this modification intersects with Millennium's proposed route in the vicinity of South Mountain, then follows the Palisades Interstate Parkway north for approximately 4.2 miles. It would then follow the electric transmission right-of-way owned by Orange & Rockland and two parallel Algonquin pipelines for approximately 4.1 miles until it reaches the Hudson River. The crossing would occur under Orange & Rockland's facilities. Like Route 10, the pipeline would then follow Con Ed's electric transmission lines near Buchanan, to rejoin the FERC certificated route in the Town of Cortlandt. *See* New York Reply Brief at 157; Baker Engineering Report at 16.

⁷⁶New York Reply Brief at 157.

⁷⁷ New York proposed two routes that would utilize the Lovett Power Plant River Crossing. These routes, referred to by the parties as "Route 7," and "Route 8," comprise Map Segments S, R, and O, and Map Segments Q, R, and O, respectively. *See* Baker Engineering Report, Attachments 2 & 4. Route 7 would follow the CSX railroad right-of-way to the Lovett Power Generation Plant, while Route 8 would instead follow the Orange & Rockland electric transmission right-of-way to the Lovett facility. Both routes would cross the Hudson River at Lovett, landing at the LaFarge Gypsum plant. Like Routes 9 and 10, both routes would then follow Con Ed's electric transmission lines near Buchanan, to rejoin the FERC certificated route in the Town of Cortlandt. *See* New York Reply Brief at 151-54; Baker Engineering Report at 14-15.

⁷⁸ New York Reply Brief at 150.

Of the three,⁷⁹ Millennium acknowledged that the river crossing proposed in the Electric Transmission Right-of-Way option is viable.⁸⁰ Given the parties' agreement that the river crossing component of the Electric Transmission Right-of-Way option can be constructed, it is necessary to consider whether the complete route for this option (see map segments M, P and O) is reasonable and available.

– Electric Transmission Right-of-Way Alternative

As a general matter, Millennium asserted that the modification is “unconstructable and entails significant adverse impacts to the [Palisades Interstate Parkway]; thus, it is not an available or reasonable alternative.”⁸¹ Two of the three segments comprising the route (map segments M and O) are considered below. (The third segment, map segment P, is the portion of the route crossing the river discussed *supra*.)

1. Western Shore - from the FERC-Certificated Route to the Hudson River via the Palisades Interstate Parkway (Map Segment M) and Orange & Rockland/Algonquin Right-of-Way (Map Segment M)

Millennium and its consulting engineer indicated that construction of a portion of the proposed

⁷⁹ Millennium suggested crossing the Hudson River at the Algonquin Right-of-Way site is not feasible and that the Lovett Power Plant crossing is “likely not feasible.” See Baker Engineering Report at 15-16; *see also* Millennium Reply Brief at 100-105. New York, however, disputes these assertions, finding both crossings feasible, reasonable and available. *See for example*, New York Reply Brief at 150, 159.

⁸⁰ Millennium's consulting engineer described the crossing as having an “approach to the eastern shore . . . [with] adequate workspace and . . . [with good] transition from the river through the shoreline and to landfall The western approach is difficult but it can be done.” Baker Engineering Report, Attachment 5, at 12; *see also* Millennium Reply Brief at 104.

Interestingly, Millennium's expert appears to contradict Millennium's own earlier findings that no appropriate crossing location existed outside of Haverstraw Bay. *See* Millennium Initial Brief at 101 (Millennium conducted an exhaustive review along a 15-mile stretch of the river with a team of experts, and “[d]espite all of this effort” found no alternative crossings to exist), and at 102-104 (Millennium evaluated, at FERC's request, two crossings north of Haverstraw Bay, and concluded there was not adequate workspace, nor was there a suitable location at other areas considered north of Haverstraw Bay).

⁸¹ Millennium Reply Brief at 103.

segment in Rockland County (Map Segment M) is not feasible.⁸² At issue is Millennium's ability to install the pipeline along a utility right-of-way that travels through a populated area with limited space for construction.⁸³ An existing overhead electric transmission line and two parallel underground pipelines located along the right-of-way are complicating factors.

New York, relying on its engineering expert, argued adequate room exists for installing the pipeline along the right-of-way. New York pointed out that a field review conducted by its engineers determined that, while seven relatively new homes are in close proximity to the route, the homes are set back sufficiently to allow installation of Millennium's pipeline along the edge of the right-of-way.⁸⁴

Aside from construction feasibility issues, Millennium asserts that locating the pipeline along the Parkway would result in impacts that are "severe, profound, and permanent."⁸⁵ Construction would require the clear-cut of 33 acres of mature forest and produce visible permanent scars where rock has to be blasted and/or trenched.⁸⁶

⁸² Baker Engineering Report, Attachment 5 at 10. However, that report indicates that construction does appear feasible for the portion of the pipeline that would run parallel to the Palisades Interstate Parkway. Baker Engineering Report, at 16.

⁸³ *Id.*

⁸⁴ New York stated the pipeline can be installed in a reduced width corridor (30 feet) adjacent to the homes using drag sections. As an alternative, New York's engineers also identified a variation on this route that would allow a greater distance from the homes. The variation, with the cooperation of Algonquin, would lessen the spacing between the existing and the new pipeline from 25 to 15 feet. New York Reply Brief at 158.

In response, an affidavit from Millennium's consulting engineer raised general – non site-specific – concerns regarding the use of a 30-foot construction right of way. For example, the affidavit advised that a reduced width corridor may be used only in localized areas for short distances under ideal conditions not found along the Palisades Parkway. In addition, the affidavit suggested a wider workspace is necessary for passing and efficient operations – and that adequate staging and suitable access would still be required in the near vicinity. Affidavit of Charles E. Russell, Jr., Professional Engineer, Apr. 18, 2003, at 6. Millennium does not specifically respond to the route variation identified by New York, but notes that standard industry practice calls for a minimum separation distance of 25 feet when paralleling an existing pipeline. Baker Report at 7.

⁸⁵ Millennium Reply Brief at 104; *see also* Baker Engineering Report at 16.

⁸⁶ Baker Engineering Report at 10, 16.

New York characterizes Millennium's assessment of impacts as "far-fetched," claiming it results from "exaggerated construction and siting requirements." New York argues that its consultant has demonstrated "the pipeline can be constructed in a manner that avoids or minimizes impacts" ⁸⁷

2. Eastern Shore - from the Hudson River to the Connection with the FERC-Certificated Route (Map Segment O)

With regard to the segment leaving the eastern shore of the Hudson River, Millennium raised two concerns. First, it identified a portion for which construction would be "extremely difficult" (involving crossings of State Route 9A and a railroad right-of-way). ⁸⁸ More significantly, Millennium argued a separate stretch (crossing State Route 9) "is infeasible due to extensive rock walls close to the highway, which preclude adequate room to bore the highway." ⁸⁹

In response, the State contended the crossing of State Route 9 "is difficult, but possible." ⁹⁰ This conclusion is based on evaluations by New York's engineering consultant, which considered New York State Department of Transportation State Route 9 highway right-of-way and infrastructure plans and as-built specifications. ⁹¹ New York also argued that physical constraints that make construction more difficult or require more sophisticated methodologies do not render the route "non constructable." ⁹²

After reviewing the information provided by New York, Millennium's consultant Baker Engineering conducted additional field visits to the area and reiterated earlier conclusions noting ". . . construction in this location is complicated by the severe grade changes that occur in a very short distance . . . a boring is not feasible . . . [and] there is insufficient room to construct the bore

⁸⁷New York Reply Brief at 157-58.

⁸⁸ Millennium explains that the crossings would be extremely difficult "because of a small pond, the railroad, the highway, and a steep slope." Millennium Reply Brief at 102, 104; *see also* Baker Engineering Report, at 15-16. In addition, "[s]ubsurface conditions, such as solid rock, *may* make boring and other construction activities very difficult in this area." Baker Engineering Report, at 15-16 (emphasis added).

⁸⁹ Millennium Reply Brief at 102, 104; *see also* Baker Engineering Report at 15, 16.

⁹⁰ New York Reply Brief at 153; *see also* New York Exh. 52, State Route 9 Crossing, O'Brien & Gere Engineers, Inc., March 2003.

⁹¹ New York Reply Brief at 153.

⁹² *Id.*, at 154.

pits.”⁹³

3. Discussion

Millennium identified various construction impediments for the proposed route modification, suggesting that difficulties are so significant as to make installation of the pipeline impossible. In an earlier appeal decision also involving an energy project, the Secretary of Commerce analyzed another situation in which there were significant difficulties with an alternative. The alternative in that case was characterized as being “extremely difficult, if not impossible to secure,” “time consuming” (taking potentially up to four years to complete), “expensive,” and “uncertain.” Nevertheless, the Secretary found the alternative to be reasonable and available.

Relying on the standards used in this earlier decision, Millennium has not met the burden of demonstrating that the Electric Transmission Right-of-Way Modification is unavailable or so costly as to render it unreasonable. Similar to the situation in Chevron, Millennium has not shown, with certainty, that any of the construction difficulties identified throughout the length of this modification present obstacles that cannot be overcome through reasonable efforts. In addition, portions of Millennium’s arguments are conclusory, or non site-specific and therefore

⁹³ Affidavit of Charles M. Russell, Jr., P.E. (Russell Affidavit), at 16-17.

⁹⁴ Chevron proposed drilling exploratory oil and gas wells to evaluate the commercial hydrocarbon potential of a lease off the California coast. The state identified two alternatives: (1) emission offsets (a reduction of emissions elsewhere in the same air basin); and (2) on-site emission reductions (such as using a different drillship having a cleaner-burning engine than proposed by the company). Despite Chevron’s concerns with offsets noted *supra*, offsets were found to be a reasonable and available alternative. (The drillship alternative was similarly found reasonable and available.)

The decision suggests: (1) a company must directly attempt to locate and secure cost information about the alternative in order to state with certainty the cost of such alternative (e.g., failure to obtain specific contracting and transportation costs precluded the company from concluding that bringing a drilling rig “around the world would be prohibitive”); (2) potential revenues from the project may be considered when evaluating the reasonableness of an alternative; (3) the views of expert federal agencies may be considered in determining the value or significance of an alternative; and (4) the degree of effort exerted by a company affects the implementation of an alternative (for Chevron, this referred to speed of implementation). Chevron Decision, Oct. 29, 1990, at 58-67.

not compelling.⁹⁵ This is particularly true with respect to Millennium's concerns regarding the limited workspace corridor in Rockland County. Millennium notes the difficulty of using a narrow construction right-of-way under less than ideal conditions along the Palisades Parkway, but presents no information on the specific conditions at the site in question along the utility right-of-way.⁹⁶ Nor did Millennium address a variation to this route identified by New York.⁹⁷

⁹⁵ Regarding conclusory statements, one crossing is identified as being "extremely difficult" because of a small pond, the railroad, the highway and a steep slope. Baker Engineering Report, at 15. Presumably, similar obstacles will be encountered and successfully negotiated at other points along the 420-mile pipeline route.

⁹⁶ The site at issue involves a utility right-of-way that is not located alongside the Palisades Parkway. Other examples of generalized concerns include: (1) statements indicating certain specialized construction techniques can only be used "for short distances" (with no explanation of "how short is short" or a statement that the segment in question is longer than the maximum length for which the technique can be used); and (2) a suggestion that an "adequate staging area . . . [is] required in the near vicinity" without answering whether this requirement can be accommodated at the site in question. Millennium also suggests a key concern with the use of a narrow construction corridor right-of-way is reduced efficiency of operations. This issue is not relevant to determining whether a route modification is available unless the inefficiency is of such magnitude as to make construction of the entire project financially infeasible. Similarly, it affects "reasonableness" only to the extent that an increase in project costs associated with the route modification is so significant as to outweigh the benefits for the modification. Millennium has provided no specific cost information and therefore has made no showing that the modification is unavailable or unreasonable on the basis of inefficient operations. *See supra* fn. 84.

In addition, New York points out that Millennium will be using a 20 foot corridor to install the pipeline in the City of Mount Vernon, New York, which is 10 feet *narrower* than New York's proposed width for the site in question along the utility right-of-way. *See* New York Initial Brief at 102; New York Reply Brief at 158. Millennium has not specifically addressed this issue.

⁹⁷ New York suggested an optional modification to a portion of the route (by "following the electrical transmission lines south to the [Palisades] Parkway. . .") to allow a greater distance from homes located near the utility right-of-way. New York Reply Brief at 158. (The modification is not required for the pipeline to reach the river, but could be used by Millennium if the overall route modification were found reasonable and available.) New York indicates Algonquin's cooperation would be needed to lessen the spacing between lines from 25 feet to 15 feet. *Id.*

Alternatives that involve agreements with third parties have been found "unavailable" in instances where no portion of the alternative could be undertaken without the agreement. *See for example*, VEPCO Decision, May 19, 1994, at 45 (a proposal to supplement the water supply of

In addition, Millennium does not refute New York's assertion that, despite difficulties noted by Millennium with the 30 foot wide right-of-way, installations in close proximity to existing utility infrastructure are "becoming more common in congested areas" and certainly are not infeasible through the use of special designs, construction safety procedures and in cooperation with co-located utilities.⁹⁸

With regard to the segment of the Electric Transmission Right-of-Way Modification on the eastern shore of the Hudson River, feasibility centers exclusively on crossing underneath State Route 9.⁹⁹ New York's expert provided information suggesting that boring under State Route 9 is feasible. The New York State Public Service Commission, an agency recognized by Millennium as having pipeline construction expertise comparable to FERC,¹⁰⁰ appears to have

the City of Virginia Beach with water from Norfolk, Virginia was unavailable because Virginia Beach could not compel Norfolk to implement the proposal.) However, in Millennium's appeal, Algonquin's concurrence is not an impediment that would make New York's modification unavailable. First, the alternate route is still feasible, even without the modification suggested by New York. Second, the need for agreement with a third party will not make an alternative unavailable if there is an established process to obtain the necessary approval. VEPCO Decision, May 19, 1994, *ftnt.* 308 at 126. New York suggests such a process exists within the utility industry, noting for example, that Consolidated Edison has a "practice [of] address[ing] requests for use of right-of-way on a case-by-case basis." New York Reply Brief at 154. More generally, New York notes that utilities have, in the past, allowed projects to be constructed with reduced spacing between utility infrastructure. Both the specific and general past industry practice is sufficient evidence, for purposes of the Element 3 analysis, to conclude the existence of a process sufficient to satisfy the VEPCO exception. To find otherwise would: (a) unreasonably burden a state to obtain concurrences in the limited period available for preparing its appeal briefs; (b) be unnecessary, given the lack of evidence suggesting such concurrence will not be received; (c) conflict with past appeal decisions, which do not require that an alternative be immediately available to the appellant (*see* Findings and Decision in the Matter of the Appeal by Exxon Co., U.S.A. (Santa Ynez Unit), Feb. 18, 1984, at 15-16); and (d) potentially make alternatives for all projects unavailable.

⁹⁸ New York Reply Brief at 156. New York's consulting engineering firm advised that pipelines "have, for many years, been designed and installed with clearances of less than 25 feet where right-of-way constraints have made it necessary" New York Reply Brief at 155.

⁹⁹ Although advising that construction of other portions of this segment would be "extremely difficult," Millennium never indicated that such construction is infeasible. *See* Baker Engineering Report at 15, 16.

¹⁰⁰ Millennium Surreply Brief, at 24, *ftnt.* 91.

concurred in this assessment.¹⁰¹ The FEIS also appears to corroborate the State's conclusion.¹⁰²

Millennium's expert disagrees with New York and points out there is insufficient room to construct bore pits. A cross-section diagram provided by Millennium's expert notes a variety of "questionable construction issues." For example, it states that the bore under the highway would be "near the length limit of accurately controlling the direction of the drillhead."¹⁰³ However, segments of the route that require the use of drilling techniques that approach, but do not exceed, the limits of conventional technology do not render construction of the pipeline infeasible, although the result may be a more difficult, time-consuming, and expensive process for Millennium. Consequently, construction of the modification would still be considered available.

¹⁰¹ New York consulted with the New York State Public Service Commission and other state agencies specifically to develop feasible alternatives to the FERC-approved route. New York Initial Brief, at 86.

¹⁰² The FEIS evaluated a crossing of the Hudson River in the vicinity of the Algonquin pipeline. Millennium indicated that the eastern segment of the FEIS' Algonquin crossing (i.e., the portion leading from the Hudson River to reconnect with Millennium's proposed route) is virtually identical to the eastern segment of the Electric Transmission Modification. Baker Report at 17 and Attachment 2 (identifying the eastern segment of the FEIS' Hudson River North Crossing as Map Segment O). *See also* Baker Engineering Report, Attachment 4 (map including route of the Electric Transmission Modification); Millennium response to FERC (OPR/DEER/ERC II) Data Request No. 9, Mar. 2, 1999 (including map highlighting proposed Algonquin crossing). The overlap for the two routes would include the area that Millennium concludes cannot be constructed. *See* Russell Affidavit at 16 (emphasis added) ("[a]ll of the alternative routes proposed by New York *and others* converge at this point [crossing State Route 9].")

In describing the eastern overland portion of the Algonquin route, the FEIS states "[b]eyond the east shore, the modification would include crossing State Route 9A (with a bridge crossing), a railroad and commercial and residential development areas." FEIS at 6-4. Significantly, the FEIS made no mention of potential problems with crossing State Route 9; nor did it suggest any portion of the route on the eastern leg was infeasible. Instead, the FEIS found that "existing utility and industrial development on both banks [of the Hudson River] and topography" would probably preclude a crossing at this site. FEIS 6-4, 6-5. However, the feasibility of the crossing for the Electric Transmission Modification is not at issue. *See supra* fn. 80.

¹⁰³ Russell Affidavit, Exh. "H" - Route 9 Crossing, Montrose, NY, Alternative Alignment.

Millennium provided no information concerning the cost to construct any of the alternative routes.¹⁰⁴ Consequently, there is no basis for concluding that the modification would be infeasible from a financial perspective. In addition, having failed to compare the cost of the FERC certificated route with the cost of the proposed modifications, including specifically the Electric Transmission Right-of-Way Modification, Millennium does not meet its burden of demonstrating that any of the modifications are unreasonable. *See* Chevron Decision, Oct. 29, 1990, at 67; *see also* Decision and Findings in the Consistency Appeal of Carlos A. Cruz Colon, Sept. 27, 1993, at 12.

The record, however, clearly indicates that a northern crossing of the Hudson River would, in comparison to Millennium's Haverstraw Bay route, produce an appreciable benefit to the resources and uses of the New York State Coastal Zone. Haverstraw Bay, designated a Significant Coastal Fish and Wildlife Habitat, is a uniquely productive portion of the Hudson Estuary and crossing north of this protected area "represents a significant reduction in impacts on aquatic resources and habitats. . . ." ¹⁰⁵

Three federal agencies expressed significant concerns regarding Millennium's proposed crossing.¹⁰⁶ The National Marine Fisheries Service (NMFS) concluded that while Millennium's appeal does not appear to satisfy the grounds set forth in the CZMA for an override of New

¹⁰⁴ In its Reply Brief, New York argued that the project is expected to generate significant revenues so that any of the modifications would be feasible from a financial standpoint. New York Reply Brief, at 120 - 124. New York also stated that "[i]n terms of overall cost of the alternatives. . . each alternative is within the range of pipeline construction for lines of this length." New York Reply Brief at 121. Millennium does not provide a detailed reply to these arguments. *See also* Chevron decision *supra* fn. 94.

¹⁰⁵ Letter from William T. Hogarth, Assistant Administrator for Fisheries, National Marine Fisheries Service to Branden Blum, National Oceanic and Atmospheric Administration, Dec. 5, 2002, at 3.

¹⁰⁶ The National Marine Fisheries Service advised that Millennium's proposal "would create significant and long-term impacts in New York's coastal zone, including the Haverstraw Bay habitat." *Id.*, at 2. The U.S. Fish and Wildlife Service concluded that the proposed crossing at Haverstraw Bay would "contribute directly to the degradation of important fish and wildlife habitats. . . ." and recommended upholding New York's objection to the pipeline project. Letter from Mamie A. Parker, U.S. Fish and Wildlife Service to Branden Blum, NOAA, November 27, 2002, at 1, 3. The Department of the Army forwarded comments from the Army Corps of Engineers that expressed "substantial concerns about the environmental impacts of the proposed Hudson River crossing, similar in nature to those expressed by [New York]." The Corps' letter pointed out that a crossing "north and outside of Haverstraw Bay" was one of several alternatives that would largely address the agency's concerns. Letter from George Dunlop, Department of the Army to Scott B. Gudes, NOAA, Nov. 21, 2002, enclosure at 2.

York's objection, New York had identified reasonable alternatives that would eliminate the habitat impairments created by Millennium's project.¹⁰⁷ NMFS noted that other reaches of the Hudson River do not support the same importance and intensity of ecological values and functions as Haverstraw Bay, and noted in particular that routing the pipeline north of Haverstraw Bay would involve a less ecologically sensitive area and is "ecologically preferred." *Id.* at 3. New York made a similar conclusion, finding the Electric Transmission Right-of-Way Modification was consistent with the State Coastal Management Program, including the policy of protecting significant coastal fish and wildlife habitats. The FEIS considered two northern crossings of the Hudson River (adjacent to the existing Algonquin pipeline) but concluded neither was feasible from a construction standpoint.¹⁰⁸

In sum, information contained in the appeal record indicates that crossing the Hudson River north of Haverstraw Bay at the location of the proposed Electric Transmission Right-of-Way Modification will reduce adverse impacts to one of the most important fish and wildlife habitats in the Hudson River estuary. Absent documentation relating to the actual costs of the modification, there is no basis to conclude that these costs outweigh the modification's significant environmental advantages. The modification is therefore reasonable.

New York City Drinking Water Supply and Delivery System

Catskill Aqueduct Crossing

The proposed pipeline route would pass within several feet of the 90-year old Bryn Mawr Siphon (Siphon), a high-pressure juncture in the Catskill Aqueduct (Aqueduct) located in Yonkers, New York. The Aqueduct supplies forty percent of the drinking water for New York City.¹⁰⁹

¹⁰⁷ Letter from William T. Hogarth to Branden Blum, Dec. 5, 2002, at 3, 5.

¹⁰⁸ FEIS at 6-5. The FEIS stated one of the routes could not be "reasonably" constructed because it would require significant in-street construction in congested areas, but nevertheless acknowledged the most significant advantage of a northern alternative was its avoidance of Haverstraw Bay. The FEIS did not evaluate the specific route of the Electric Transmission Right-of-Way Modification (although it does suggest the eastern portion is feasible). (*See infra* ftnt. 102.) Regarding potential impacts of the Electric Transmission Right-of-Way Modification, Millennium has suggested 33 acres of mature forest would need to be clear cut. Baker Engineering Report, at 16. New York believes that only 13 acres would be affected using a more limited construction corridor. New York Reply Brief at 157-158. While the loss of mature trees may affect coastal resources and uses, those impacts have not been described by the parties, and the record does not suggest they are likely to be significant. This conclusion is supported by New York's determination that the modification is consistent with its Coastal Management Program.

¹⁰⁹ *See* New York Reply Brief at 110, 113; Amicus Brief of the City of New York at 2; FEIS at 5-62. New York asserted that a rupture of the pipeline would cause a catastrophic failure

New York indicated that in order to be considered consistent with the State's coastal management program, the pipeline route must "avoid the New York City drinking water supply"¹¹⁰ and delivery system."¹¹¹ The State identified three alternate routes that would avoid the Bryn Mawr Siphon, but focused its comments primarily on the:

New York State Thruway (Thruway) Modification - this route would divert from the proposed route and reconnect south and east of the Catskill Aqueduct. Specifically, it would cross under the Thruway, proceed down its west side for approximately 350 feet, and then cross back under the Thruway, avoiding the Bryn Mawr Siphon entirely.¹¹²

The Thruway route is approximately 650 feet long.¹¹³ New York confirmed that this route is

of the Siphon, leading to the immediate release of one million gallons of water and a total volume of 10 to 20 million gallons. New York Reply Brief at 111.

Millennium noted the Bryn Mawr Siphon's location outside the coastal zone and questioned whether impacts involving the Siphon are properly considered as part of this appeal. *See, e.g.*, Millennium Reply Brief at 65-66. The CZMA provides that states may review projects requiring federal licenses or permits that are located "in or outside of the coastal zone" if the project "affects any land or water use or natural resource of the coastal zone" 16 U.S.C. § 1456(c)(3)(A).

According to FERC, the FEIS indicates that a rupture of the aqueduct would result in a loss of water and water pressure and pose a threat to human health. 97 FERC ¶ 61,292 at 62,335. This loss of water would directly affect New York City, a part of which is located within the coastal zone. Therefore, New York was correct in considering the pipeline's impacts, because a failure of the Siphon would have direct impacts on the resources and uses of the coastal zone.

¹¹⁰ The term "drinking water supply" appears to reference the New Croton Reservoir Watershed which is a source of water supplied to the City of New York. The State has indicated that proposed pipeline crossings north of Haverstraw Bay do not require modification when passing in the vicinity of the reservoir in order to be consistent with the coastal management program. *See for example* New York Reply Brief at 159.

¹¹¹ *See supra* fn. 64.

¹¹² New York Reply Brief at 170.

¹¹³ *Id.* The City of New York (City), an amicus for this appeal proceeding, indicated that the Thruway modification is "a feasible crossing" which it believes poses far less risk to the Aqueduct than Millennium's proposed route. Amicus Brief of the City of New York at 9; *see also* Public Comments of the City of New York Department of Environmental Protection at 2-3.

consistent with its coastal management program.¹¹⁴

In response, Millennium has identified concerns similar to those raised for the “Eastern Shore” segment of New York’s Electric Transmission Right-of-Way Modification,¹¹⁵ arguing that the route modification around the Siphon is not feasible, and therefore, not available.¹¹⁶

Discussion

As discussed *supra*, Millennium has not shown, with specificity, that any of the difficulties it identified present obstacles that cannot be overcome through reasonable efforts. As an initial matter, the potential closure of multiple lanes of traffic is not relevant to the route’s availability. The closures, while potentially burdensome to the public, do not appear to affect New York’s coastal resources or uses. In addition, New York has determined that the route modification is consistent with the State’s Coastal Management Program.

A number of Millennium’s additional arguments are vague and either suggest potential difficulties that fall short of infeasibility or lack sufficient weight to satisfy its burden of proof. For example, Millennium referenced a rock “cliff” adjacent to the highway, but failed to explicitly identify the problem it presented or to respond to New York’s suggestion concerning this structure.¹¹⁷ Millennium points to New York’s failure to provide correspondence from the New York State Public Service Commission, a recognized expert in pipeline construction matters,¹¹⁸ in support of the Thruway Modification. This comment incorrectly suggests the

¹¹⁴ New York Reply Brief, at 170.

¹¹⁵ See, e.g., Millennium Surreply Brief at 22; see also *supra* at 28.

¹¹⁶ Specifically, Millennium argues that boring would be required along approximately 600 feet of the proposed route, that boring pits would need to be located within the middle of the Thruway, and that the “net result would be the closing of multiple lanes of Thruway traffic for extended periods of time.” Russell Affidavit at 18 ¶ 42. The pipeline would also need to be routed around an apartment complex and electrical towers that allegedly would prevent the pipeline from being bent sufficiently to reconnect to the proposed route. Baker Engineering Report at 23. In addition, a “rock cliff” is immediately adjacent to the Thruway at the crossing. Millennium Reply Brief at 115.

¹¹⁷ Russell Affidavit at 17; New York Reply Brief at 171. Millennium’s diagram of the Thruway crossing recharacterizes the “cliff” as an “outcropping.” Russell Affidavit, Exh. I. New York proposed removing a portion of this rock wall to create a receiving pit. *Id.* Millennium did not explicitly respond to this suggestion.

¹¹⁸ See *supra* at 31.

burden of proof on this issue rests with the State.¹¹⁹ New York confirmed that the New York State Public Service Commission and other state agencies were consulted as part of the State's process of developing feasible alternatives to the proposed pipeline route,¹²⁰ providing further support for New York's determination.¹²¹

In sum, the information in the record does not suggest that construction of the Thruway modification will be without complication. However, the obstacles are not so severe as to suggest infeasibility. To a large degree, much of the evidence concerning feasibility is conclusory and involves the conflicting opinions of experts. In addition to the State, the New York City Department of Environmental Protection has also contradicted Millennium's conclusions, and believes the pipeline can be built along the Thruway.¹²² On balance, the arguments and documents provided by Millennium do not satisfy its burden of proof to establish that the Thruway modification cannot be constructed. Consequently, this modification of Millennium's route is available.¹²³

Regarding reasonableness of this modification, routing the pipeline to avoid the aqueduct will avert the potential for significant harm to the resources of New York's coastal zone in the event of rupture at the Bryn Mawr Siphon. As noted by the State, a crossing which avoids the Siphon would "safeguard the City's water supply and thus offer a significant environmental benefit."¹²⁴ Given the absence of information on additional costs to Millennium for constructing this alternate routing of the pipeline, the Thruway Modification is reasonable.

¹¹⁹ The state's burden of proof is limited to identifying an alternative with sufficient specificity and confirming that it would allow a project be conducted in a manner consistent with the state's coastal management program. *See supra* at 23.

¹²⁰ New York Initial Brief, at 86.

¹²¹ Millennium's one-sentence declaration (listed on a diagram of the Thruway alignment) that the route exceeds pipe bending capabilities appears inconsistent with the statement of Millennium's own expert. In discussing the modified route proposed by New York, the expert refers on three separate occasions to 90 degree turns in the pipeline without any suggestion that such specifications could not be constructed. Russell Affidavit, at 18 ¶¶ 43, 44.

¹²² New York Reply Brief at 170.

¹²³ The record contains no information as to the additional cost Millennium would incur for constructing the Thruway modification. Consequently, there is no basis for finding that the modification is infeasible from a financial perspective.

¹²⁴ New York Reply Brief at 171.

Conclusion - Element 3

Based upon the information contained in the record for this appeal, the Electric Transmission Right-of-Way Modification and the Thruway Modification are found to be an available, reasonable alternative that would allow Millennium's proposed pipeline project to be constructed and operated in a manner consistent with the State of New York's Coastal Management Program.¹²⁵

2. Conclusion - Ground I

Millennium fails to satisfy Element 3 of Ground I. Having failed to fulfill all of the elements of Ground I, New York's objection to Millennium's proposed pipeline project cannot be overridden on the basis that the project is consistent with the objectives of the Coastal Zone Management Act. 16 U.S.C. § 1456(c)(3)(A).

C - Necessary in the Interest of National Security (Ground II)

The second statutory ground (Ground II) for an override of a state's objection to a proposed project is a finding that the activity is necessary in the interest of national security. To make this determination, a finding is required that "a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed."¹²⁶

In deciding Ground II, considerable weight is given to the views of the Department of Defense and other federal agencies with regard to whether the proposed project directly supports national defense or other essential national security objectives.¹²⁷ However, none of the comments received from federal agencies indicate a national security interest would be significantly impaired if the pipeline were not constructed along the FERC-certified route. The Chairman of the Federal Energy Regulatory Commission advised that the project would "contribute to the region's energy security, a particularly vital national consideration at the present time."¹²⁸ The

¹²⁵ This finding is made without prejudice to any of the other alternatives determined by New York to be consistent with the State's Coastal Management Program, which may also be reasonable and available pursuant to Element 3. However, it is not necessary to make a finding regarding these alternatives for purposes of deciding Millennium's appeal. In addition, the State is not precluded from agreeing to other changes in Millennium's proposed route, thereby allowing further modifications as required to meet the interests of the parties.

¹²⁶ 15 C.F.R. § 930.122.

¹²⁷ *Id.*

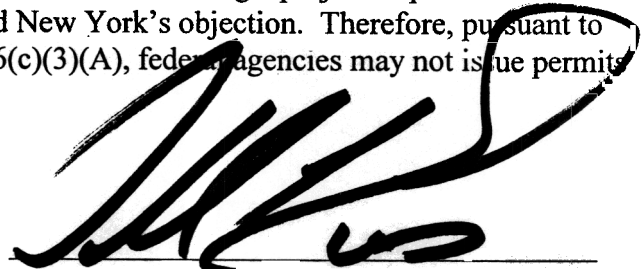
¹²⁸ Letter from Pat Wood, III, Chairman, Federal Energy Regulatory Commission, to Scott B. Gudes, NOAA, November 15, 2003, at 2.

Department of Energy (DOE) commented that, “[t]he Millennium Pipeline Project is necessary in the interest of national security” and emphasized the project’s importance to meeting increased energy needs of the northern United States.¹²⁹ Comments from the Department of Defense focused on the project’s environmental impacts and whether alternatives to the Haverstraw Bay crossing might exist.¹³⁰

The standard for meeting the criteria of Ground II is clearly stated in 15 C.F.R. § 930.122 – *significant impairment* to a national defense or other national security interest if the particular project is not allowed to go forward *as proposed*. General statements that the project furthers or is important to the national interest fail to satisfy the requirements of Ground II. The record for this appeal does not contain information indicating that a specific and significant impairment of a national security interest would result if Millennium’s project were not permitted to go forward as proposed. Therefore, the requirements for Ground II are not met.

IV - CONCLUSION

For the foregoing reasons, I find Millennium’s proposed project does not satisfy either of the two grounds set forth in the Coastal Zone Management Act for allowing a project to proceed notwithstanding a state’s objection, and I uphold New York’s objection. Therefore, pursuant to the Coastal Zone Management, 16 U.S.C. §1456(c)(3)(A), federal agencies may not issue permits or licenses for the pipeline project as proposed.



Donald L. Evans
Secretary of Commerce

12 Dec 03
Date

¹²⁹Comments of the U.S. Department of Energy on the Federal Consistency Appeal by the Millennium Pipeline Company, L.P. from an Objection by the New York Department of State, at 1.

¹³⁰See Letter from George Dunlop, Dept. of the Army, to Scott B. Gudes, NOAA, Nov. 21, 2002, and enclosure.